

Chapter 7: Domestic violence and immigration law

Perpetrators of domestic violence often threaten to send their partners who are on temporary visas home to their country of origin. This chapter will help you to advise your clients who are newly arrived migrants experiencing domestic violence.

Family violence provisions

Schedule 2 of the *Migration Regulations 1994* (Cth) (Migration Regulations) provides that the following temporary visa holders can apply for permanent residency if they have experienced family violence, before they would have otherwise been entitled to apply for it, being two years after being with their sponsor:

- a) partner subclasses 309, 100, 820, 801;
- b) prospective marriage (fiancé) subclass 300 (in limited circumstances);
- c) dependent child subclass 445; and
- d) distinguished talent subclass 858.

Regulation 1.12 of the Migration Regulations defines family violence as:

conduct, whether actual or threatened, towards:

- (a) *the alleged victim; or*
- (b) *a member of the family unit of the alleged victim; or*
- (c) *a member of the family unit of the alleged perpetrator; or*
- (d) *the property of the alleged victim; or*
- (e) *the property of a member of the family unit of the alleged victim; or*
- (f) *the property of a member of the family unit of the alleged perpetrator;*

that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.

The sponsoring partner or the primary applicant (distinguished talent visas) must have committed family violence while the relationship existed

according to regulation 1.23. If the victim holds a subclass visa 300 (a fiancé visa), they must have been married to the sponsor (Migration Regulations, Schedule 2, clause 820.211(8)(b)). The relationship must have been 'genuine and continuing' and the victim must have formed the view that the family violence occurred.

Procedure where there is family violence

If your client has experienced family violence and their relationship with the perpetrator has ended they should advise the Department of Immigration and Border Protection (DIBP) of their change of address by submitting Form 929, and change of circumstances, that is, their relationship breakdown due to family violence by submitting form 1022.

If your client fails to advise DIBP of their change in circumstances, DIBP could refuse their permanent visa application without seeking further information.

Practitioner tip

Your client should always get legal advice before advising the DIBP about their change in circumstances.

Proving family violence

Your client can prove family violence by providing:

- ▶ judicial evidence (DIBP must accept that family violence has occurred);
- ▶ non-judicial evidence (DIBP may accept that that family violence has occurred);
- ▶ independent expert evidence (DIBP must accept their findings).

Judicial evidence

Judicial evidence is:

- ▶ an injunction made under sections 114(1)(a), (b) or (c) of the *Family Law Act 1975* (Cth) (Migration Regulations 1.23(2)); or
- ▶ an apprehended domestic violence order made after the court had given the alleged perpetrator an opportunity to be heard, or to make submissions to the court, in relation to the matter (Migration Regulations 1.23(4)); or
- ▶ the perpetrator has been convicted or found guilty of a violence offence against the victim (Migration Regulations 1.23(6)).

Non-judicial evidence

Non-judicial evidence is defined as:

- a) a joint undertaking; or
 - b) a statutory declaration by the visa applicant; and
- at least two items from the following list:
- a medical report, hospital report, discharge summary or statutory declaration by a registered medical practitioner;
 - a report or record of assault, a witness statement or a statutory declaration made by a federal or state police officer, or a witness statement made by someone other than the alleged victim during the course of a police investigation;
 - a report or statutory declaration made by an officer of a child welfare or child protection authority;
 - a letter or assessment report made by a women's refuge or family/domestic violence crisis centre on the organisation's letterhead;
 - a statutory declaration made by a social worker who has provided counselling or assistance to the alleged victim while performing the duties of a social worker;
 - a statutory declaration made by a registered psychologist who has treated the alleged victim while performing the duties of a psychologist;
 - a statutory declaration made by a family consultant appointed under the *Family Law Act 1975*; and
 - a statutory declaration or a letter on the school's letterhead made by a school counsellor or school principal acting in their professional capacity.

The list of evidence is available online.²³

Your client needs to use a Form 1410 for their statutory declaration. Their statutory declaration must:

- ▶ set out the allegation of family violence, including the effect on them; and
- ▶ name the alleged perpetrator;
- ▶ if your client is not the alleged victim, it must also:

- name the person to whom the conduct was directed;
- identify the relationship between the alleged victim and the visa applicant; and
- set out the evidence on which the allegation of family violence is based.

Professionals can use a standard Commonwealth statutory declaration and must set out:

- ▶ that it is their opinion that the alleged victim has experienced family violence;
- ▶ the basis for their opinion;
- ▶ the name of the victim;
- ▶ the name of the perpetrator;
- ▶ if the conduct of the alleged perpetrator was not specifically directed towards the alleged victim:
 - the name of the person to whom the conduct was directed; and
 - the relationship between the alleged victim and that person.

Your client must submit statutory declarations from professionals from at least two different categories. With regard to evidence from a women's refuge, there is no requirement that the manager sign the letter or the assessment report.

Independent expert advice

If DIBC is not satisfied, on the basis of non-judicial evidence, that your client has suffered family violence, the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence (regulation 1.23(10)(c)(i), Migration Regulations).

Your client will be notified if their application has been referred to an independent expert. All information provided to DIBC is forwarded to the independent expert. The independent expert can contact your client for any further information. An assessment is made by independent expert only in relation to the question of whether family violence has occurred. Regulation 1.23(10)(c)(ii) states that the independent expert finding is final and binding on DIBP.

Appeals

If DIBC refuses to grant your client's application, your client can appeal to the Administrative Appeals Tribunal (AAT). The application fees apply and fee reductions can be given if the AAT is satis-

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fied that paying the full fee has caused, or is likely to cause, severe financial hardship. There is a very strict time limit to apply, depending on where your client is located when the decision is made and how the decision was conveyed.

Other options

If your client is not eligible for a permanent visa under the family violence provisions, there may be other permanent visa options to consider.

They may be eligible for a protection visa if they meet the 'refugee' criteria, that is, they have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, and are unable or unwilling to obtain protection from home country.

They may be eligible for a complementary protection visa if they have substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from Australia to a receiving country, there is a real risk they will suffer significant harm.

Alternatively, they may be eligible for a witness protection (trafficking) visa, a skilled visa or a student visa. Contact the Immigration Advice and Rights Centre for further information about these options.